



COMMONWEALTH of VIRGINIA
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MEMORANDUM

TO: **BRIAN MCCORMICK**
Regulatory and Manual Manager
Department of Medical Assistance Services

FROM: **REATHA B. KAY**
Special Counsel to DMAS

DATE: **February 18, 2005**

SUBJECT: Emergency Regulations concerning Carve-Out of Dental Services

I have reviewed the attached emergency regulations concerning the changes to the Medallion II and Family Access to Medical Insurance Security ("FAMIS") Plan regulations concerning dental services. The Department is relying on language in Item 322(H) and Item 326(M) of the 2004 Appropriations Act (2004 Acts of Assembly chapter 4) with regard to these changes.

Item 322H provides that "[t]he Department of Medical Assistance Services shall have the authority to amend the Medallion II waiver to allow the Department to carve out dental services provided to children under the age of 21 from Medicaid managed care. In addition, the Department shall have the authority to amend the State Plans for Titles XIX and XXI of the Social Security Act, as required by applicable statute and regulations to provide dental services to children enrolled in these programs on a fee-for-service basis. The Department of Medical Assistance Services shall have the authority to enact emergency regulations under Section 2.2-4011 of the Administrative Process Act, to effect this provision. The Department of Medical Assistance Services may consider outsourcing such dental services to children under age 21 to an administrative services program."

Item 326M provides, in part, that "[i]n order to conform the state regulations to the federally approved changes and to implement the provisions of this act, the Department shall promulgate emergency regulations to become effective within 280 days or less from the enactment of this act. The Department shall implement these necessary regulatory changes to be consistent with federal approval of the wavier changes."

It is our understanding that the Department has submitted an amendment to the Medicaid managed care waiver ("1915(b) waiver") to the Centers for Medicare and Medicaid Services ("CMS") for approval. We understand that this amendment, in part, carves-out Medicaid covered dental services from services provided by

the managed care organizations. Further, it is our understanding that this amendment has yet to be approved by CMS.

Based on that review, it is this Office's view that the Director, acting on behalf of the Board pursuant to Va. Code §§ 32.1-324 and 32.1-351, respectively, (1) has the authority to promulgate emergency regulations with respect to carving out dental services for children under the age of 21 from Medicaid managed care, and (2) has the authority to promulgate emergency regulations with respect to carving-out dental services from the FAMIS Plan managed care benefit, subject to compliance with the provisions of Article 2 of the Administrative Process Act. Further, it is this Office's view that the Director, acting on behalf of the Board pursuant to Va. Code § 32.1-324, currently does not have the authority to promulgate emergency regulations with respect to carving-out adult dental benefits from the 1915(b) waiver. However, once CMS has approved the amendment to the 1915(b) waiver, it is this Office's view that the Director will have the authority to promulgate emergency regulations with respect to carving out adult dental benefits from Medicaid managed care subject to compliance with the provisions of Article 2 of the Administrative Process Act.

Accordingly, subject to CMS' approval of the 1915(b) waiver amendment, and with the prior approval of the Governor, these regulations will qualify for the "emergency" exemption from Article 2 requirements. Please be advised, however, that under Va. Code § 2.2-4011(A), the Department must state in writing the nature of and necessity for such emergency action, and this appears to have been accomplished in the "Agency Background Document." In addition, the regulations shall be effective for no more than twelve months from the emergency regulatory action on this subject matter. As the Department intends to continue regulating the subject matter governed by this emergency regulation beyond 12 months, it will be necessary to replace these emergency regulations with regulations duly promulgated under Article 2 of the APA. A Notice of Intended Regulatory Action relating to the proposed replacement regulations must be filed with the Registrar within 60 days of the effective date of the emergency regulations. The proposed replacement regulations must be filed with the Registrar within 180 days after the effective date of the emergency regulations.

If you have any questions or need any additional information, please feel free to call me at 371-8721.

cc: Kim F. Piner, Esquire

Attachment